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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 566.

PAUL WHITEMAN,

Petitioner,

—against—

RCA MANUFACTURING COMPANY, INC., W. B. O. BROADCASTING CORPORATION and ELIN, INC.,

Respondents.

BRIEF OF RESPONDENT, W. B. O. BROADCASTING CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JOSEPH M. HARTFIELD,
GEORGE C. SPRAGUE,
Counsel for Respondent,
W. B. O. Broadcasting Corporation.

THE COURT PRESS, N. Y. C.

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RCA MANUFACTURING COMPANY, INC., W. B. O. BROADCASTING CORPORATION and ELIN, INC.,

Respondents.

BRIEF OF RESPONDENT, W. B. O. BROADCASTING CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The petition in the above entitled cause is one of two for writs of certiorari filed respectively by Paul Whiteman and RCA Manufacturing Company in the case of RCA Manufacturing Company, Inc. against Paul Whiteman, W. B. O. Broadcasting Corporation, and Elin, Inc., decided by the Circuit Court of Appeals for the Second Circuit on July 25, 1940, 114 F. (2d) 86.

To avoid duplication, respondent will treat herein only such matters as are not considered in its brief in opposition to the petition filed by RCA Manufacturing Company, No. 570, to which the Court is respectfully referred.

Argument.

I.

The decision of the Circuit Court of Appeals is not in conflict with applicable local decisions nor is it in conflict with the decision of another circuit court of appeals.

Petitioner, in support of his contention of conflict, relies upon certain decisions not set forth by RCA Manufacturing Company in its petition, No. 570. These decisions are briefly considered:

a. The Circuit Court of Appeals correctly decided that any common law property right of the recording artist was lost by the sale of the records in the ordinary channels of trade.

The decision of the Court in *Universal Film Manufacturing Co.* v. *Copperman*, 218 Fed. 577 (C. C. A. 2d, 1914), cert. den. 235 U. S. 704 (1914), an earlier decision of the Court below, is not in conflict. That case clearly held that a sale of an uncopyrighted motion picture film vested the performing rights in the purchaser and that any attempt to restrict the right was void. The case squarely supports the position of this respondent which claims nothing more than the performing rights in the records purchased by it in the open market.

DeMille v. *Casey*, 121 Misc. 78 (N. Y. 1923) and *Wheaton* v. *Peters*, 8 Pet. 591 (1834) likewise do not present a case of conflict.

DeMille v. *Casey* involved the rights of a licensee and licensor of the right to make motion picture versions of certain plays. The case did not involve the

rights of a purchaser, nor did it involve either sale of copies of the plays or sale of the positive films. There was no publication.

Wheaton v. *Peters* held that, under the common law of Pennsylvania, the right of an author to the exclusive use of his work does not survive publication. *Holmes* v. *Hurst*, 174 U. S. 82 (1899) added nothing to the decision. Not a word can be found in either case indicating that alleged common law rights in works beyond the protection of copyright are perpetual and are not lost by publication.

b. The Circuit Court of Appeals correctly decided that the restrictive notice placed on certain records did not prevent loss of petitioner's alleged common law rights upon sale of the records and was invalid as an attempted servitude.

The decision of the Court below is not in conflict with the decision in the case of *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284 (1907). That case dealt with the abandonment of copyright and held that the exhibition of a copyrighted picture without attachment of copyright notice was not such a publication as to destroy the copyright where the public was admitted only on the payment of a fee and there are restrictions against copying. It was not a case involving sale on the open market, nor was it a case involving even an unrestricted showing which the Court recognized might constitute publication. A person by words alone cannot deny the consequences of his act.

Nor is the decision in conflict with the decisions in *New York Bank Note Co.* v. *Hamilton B. N. Co.*, 180 N. Y. 280 (1905), *Murphy* v. *Christian Press Assoc. Pub. Co.*, 38 App. Div. 426 (N. Y., 1899) or *Great*

Lakes etc. Distributors Co. v. *Scranton Coal Co.*, 239 Fed. 603 (C. C. A. 7th, 1907).

New York Bank Note Co. v. *Hamilton B. N. Co.* dealt with the contractual rights of a printer whose labor combined with that of a manufacturer in devising a press adapted to the printing of perforated strip tickets. The case was reversed on procedural grounds, but contained a dictum that the contract between the printer and the manufacturer by which the latter agreed not to sell presses to others for the purpose of printing strip tickets, was not void as in restraint of trade. The case does not concern the right of a vendor of an ordinary chattel to continue, by equitable servitude, his control, or that of another, over the product after he has sold it on the open market.

Murphy v. *Christian Press Assoc. Pub. Co.* dealt with contract and copyright, not chattels or servitudes.

Great Lakes etc. Distributors Co. v. *Scranton Coal Co.* was an action between the original parties to a contract and did not involve the rights of a subsequent purchaser to use a chattel.

c. The Circuit Court of Appeals correctly decided that this respondent's broadcast of petitioner's records did not constitute unfair competition.

Petitioner, as does RCA Manufacturing Company in petition No. 570, centers his argument on the alleged conflict between the decision below and *International News Service* v. *Associated Press*, 248 U. S. 215 (1918) and cases following that case. As was pointed out in this respondent's brief in opposition to petition No. 570, the *Associated Press* case sets forth a limited doctrine applicable to a restricted fact situation, and is not controlling on the case at bar.

d. The Circuit Court of Appeals correctly decided that the use of petitioner's and his orchestra's names in connection with the broadcast of petitioner's records did not violate petitioner's alleged right of privacy and property.

This respondent, upon purchasing petitioner's records, acquired the right to broadcast them, and therefore, under Section 51 of the New York Civil Rights Law, was authorized to use petitioner's name and that of his orchestra in connection with such broadcasts. The cases cited by petitioner (Brief, p. 26) involve different facts and arise under different local laws. They have no application to this petition.

II.

Petitioner has no standing in this Court to apply for the issuance of a writ of certiorari.

Petitioner is a defendant in this case. In his answer he did not request affirmative relief against his co-defendant (R. 17-20). The Court below dismissed the complaint against all defendants. Upon these facts it is submitted that the petitioner has no standing to apply for a writ of certiorari.

CONCLUSION.

It is, therefore, respectfully submitted that the petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit should be denied.

December 6, 1940.

Respectfully submitted,

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GEORGE C. SPRAGUE,
Counsel for Respondent,
W. B. O. Broadcasting Corporation.